The insurance fund also argued that an insured versus insured exclusion was invalid for the same public policy reasons that invalidated the regulatory exclusion. The court upheld the clause for the same reasons it upheld the regulatory exclusion clause.

Nonetheless, the insured versus insured exclusion did not prevent the state from suing. The court found that the clause was ambiguous because it did not define a state-appointed receiver as as an insured. To interpret the clause, the court then looked to its purpose. The court stated that the purpose of the clause was to prevent collusive law suits. Although the insurance fund sued under the rights it received from the insolvent savings and loan when it entered into receivership, there was very little opportunity for collusion to occur. As a result, the insured versus insured clause did not prevent the suit.

Parent May Recover Consortium Losses for Injuries to Adult Child

Clymer v. Webster, Case No. 88-631 (Vt. Sup. Ct. 1991) (Lexis, State Lib., Vt. file).

Vermont has joined several other states in finding that parents have a claim for loss of consortium for the death of an adult child. In this case, the plaintiffs were parents of an eighteen year woman killed by a drunk driver. Suing under a wrongful death statute and a dram shop act, the parents alleged claims against the driver and the bar. The trial court refused to consider the claim for a parent's loss of consortium. The state supreme court reversed.

The case presented a novel interpretive problem since the state wrongful death act provided that a parent could recover for the emotional losses suffered due to the death of a minor child but said nothing about the death of an adult child. The court began its analysis by stating that the remedial purpose of the statute required a liberal construction. Because of the liberal construction, the failure to cover a parent's loss of consortium was not an indication that consortium damages should not be available. The court then concluded that extending the scope of damages was consistent with the remedial purpose of the wrongful death statute.

The court then addressed the question whether the loss of the parents was pecuniary within the meaning of the wrongful death statute. The court noted that pecuniary loss historically was limited to the financial contribution provided by the child to the family. The modern trend, however, was to recognize loss of companionship as a pecuniary loss. The court concluded that "the loss of the comfort and companionship of an adult child is a real, direct and personal loss that can be measured in pecuniary terms. Children have an intrinsic value to their parents regardless of who is supporting whom at the time of death. Whether the decedent child is an adult or a minor, society recognizes the destruction of the parents' investment in affection, guidance, security and love."

The court went on to explain that deciding whether damages were available and the amount were factual questions for the jury. The jury would decide the degree of loss to the parents by hearing evidence about strength of the family ties and the perceived loss caused by the adult child's death to the other family members.

Nonviable Fetus May Recover for Loss of Parent's Consortium

Angelini v. OMD Corp., 410 Mass. 653, 575 N.E.2d 41 (1991).

This decision concluded that a nonviable fetus had a claim for loss of parental consortium. The child's father was injured as a passenger in an automobile accident and sued the driver and the bars that served the driver before the accident. The child further alleged that the father intended to provide support to his unborn child but the support was diminished as a result of the accident. At the time the parent was injured, the plaintiff was a nonviable fetus. The trial court dismissed the child's claim because he was nonviable at the time of the accident. The state supreme court reversed.

Although Massachusetts had recognized that a child had a right to loss of consortium due to the injuries to a parent, it had refused to extend the doctrine in cases in which a legal relationship such as cohabitation between the parties did not exist. To continue the line drawing, the court looked to cases determining the basis for damages associated with prenatal injuries. In these cases, the Massachusetts courts extended a cause of action to a fetus in two related circumstances. First, the child could recover if it was born alive when the injury occurred before viability. Second, the infant's estate could recover for severe injuries after viability if the injuries were fatal. The court, therefore, concluded that viability of the fetus did not control the result.

The court further noted that a child born after a parent's wrongful death could collect damages for the parent's death. To maintain consistency between the statutory interpretation and judicial developments of common law, it followed that the child should be able to collect for injuries to the parent that were not fatal. The court, therefore, concluded that a child conceived before the parent's accident and subsequently born alive could recover damages for loss of consortium if he could also demonstrate a reasonable expectancy that the parent would have provided for his care.

Thermographic Treatment Covered as Diagnostic Service

Thermographic Diagnostics, Inc. v. Allstate Insurance Co., Case No. A-89/90 (N.J. Sup. Ct. 1991) (Lexis, State lib., N.J. file).

In this case, the New Jersey Supreme Court concluded that an insurance policy providing for diagnostic services extended coverage for thermography exams. Thermography is a diagnostic procedure that measures infrared energy emitted by the skin to determine the presence of temperature differences between corresponding areas of opposite sides of the body. The insurers in this case refused to pay for treatments and argued that it was not of proven medical value and therefore was experimental. The supreme court affirmed the lower courts' determination that the costs were covered under the state's no fault law but left open some issues concerning the appropriate cost of the treatment.